IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.724 OF 2004
ALONG WITH
APPEAL FROM ORDER NO.726 OF 2004

A.O.No.724/04

Ganesh G.Chhabria. ... Appellant.
Versus.
Municiapl Corporation of
Greater Mumbai. ... Respondents.

A.O.No.726/04.

Sunder S.Devidasani ... Appellant.
Versus.
Municipal Corporation of
Greater Mumbai. ... Respondents

Shri Anil Singh with Shri S.P.Panday for the Appellants in both Appeals..

Shri N.V.Walawalkar with Shri J.Xavier for the Respondent-Corporation in both Appeals.

Smt.Geeta Mulekar, A.G.P. for the State.

CORAM : ABHAY S. OKA, J.

DATED : 25th January, 2005.

P.C.:

1. Both the Appeals pertain to two separate structures on the same property i.e. CTS No.1760, Survey No.101, Hissa No.12 situated at village Erangal, Taluka Borivali, District Mumbai. The said two structures are bungalows which according to the Appellants are farm houses. The case of the Respondent-Corporation is that the same are constructed without obtaining a valid permission. Therefore, both the Appeals can be conveniently disposed of by a common Judgment.

2. The challenge in both the Appeals is to the separtate but identical orders of the learned trial Judge dismissing the Notices of Motion filed by the Appellants in their separate suits filed for challenging the notice under section 351 of the Mumbai Municipal Corporation Act, 1888, and the order of demolition passed by the Asstt.Municipal Commissioner. Both the Appellants claim to be owners of one-half undivided share in the said land bearing CTS No.1760.

3. The Appellants have purchased their respective shares in the suit property by sale deeds executed in November 2000 by one Shri Amar Bajaj. Notices under section 351 of the said Act of 1888 are issued by the Respondent-Corporation alleging that both the Appellants have carried out illegal construction of a house each on the said plot. A reply was sent separately by the Appellants contending that the structures are old structures and they have been paying the municipal taxes for long time i.e. 1st April 1980. Along with the reply the Appellants produced bill of property tax, extract of Index-II, copy of the agreement and copy of the notice. After considering the reply sent by the Appellants, the Assistant Commissioner, P/North of the Respondent-Corporation passed orders of demolition. The Assistant Commissioner recorded that the Appellants have failed to produce authentic documents showing that the

structures are authorised or that the same are in existence prior to the datum line adopted by the Municipal Corporation for tolerating the residential structures. In the separate suits filed by the Appellants, Notices of Motion for injunction were taken out and the Notices of Motion has been dismissed by the learned trial Judge by holding that there was no evidence to show that the structures were constructed prior to the year 1980. It is pertinent to note here that it was never the case of the Appellants that any permission was obtained by their predecessors in title for construction of the structures.

4. It appears from the order sheet that the Appeals were extensively argued on 17th September 2004 before this Court. This Court passed a detailed order on 17th September 2004, which reads as under:

> "1. Heard rival parties. The legality of the structure standing on the agricultural land is the subject matter of dispute in this appeal. The appellants are claiming equitable relief of injunction in this appeal. The contention of the appellants is: They have purchased the plot of agricultural land admeasuring 1411.8 sq.yards with Farm-house standing thereon.
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> 2. If the above submission is true, then they

must show that they were agriculturist at the time of purchase of the property and that the purchase of plot was not in breach of the Prevention of Fragmentation Act.

3. As per the contention of the Appellants in these appeals, the structures were already standing since prior to the extention of the jurisdiction of the Corporation to the said area and that these structures were constructed with due permission under the Maharashtra Land Revenue Code.

4. Some of the questions which will require consideration at this stage would be as to whether or not the structures in question were standing on the land prior to the area coming within the jurisdiction of the Corporation and whether or not they were legal or authorised as per the law prevailing at the relevant time. If the structures are found to be illegal at the relevant time different consequences will flow.

5. In the above view of the matter, in order to seek proper information, in exercise of powers under Order 16 Rule 6 read with 151 of the C.P.C., I issue notice/summons to the

> Collector, Mumbai, Suburban District to produce documents in respect of the suit property showing its status prior to the extention of the Corporation limit to the area in question. Notice be made returnable after two weeks from the receipt thereof."

The report has been received from the Collector, Mumbai Suburban District, on 10th December 2004 in compliance with the aforesaid order. It is stated in the report that city survey enquiry was held in the year 1968 and at that time both the structures were not found to be in existence.

5. I have heard the learned Counsel appearing for the parties. Shri Singh, the learned Counsel appearing for the Appellants in both the Appeals has invited my attention to section 41 of the Maharashtra Land Revenue Code, 1966 (hereinafter referred to as "the said Code"). He submitted that both the structures erected are in the nature of farm houses or farm buildings within the meaning of section 2(9) of the said Code. He submitted that prior to the amendment to the said Code which was brought into force in the year 1986, a farm house could be constructed on an agricultural land without the prior permission of the Collector. He submitted that even according to the Respondent-Corporation the said structures have been assessed in the year 1980 and

therefore, the structures are authorised and no permission was contemplated under section 41 of the said Code at the relevant time. He submitted that even the Collector in his report has stated that the structures were in existence for last about 30 to 35 years. He stated that the area in which the said plot of land is situated was incorporated in the limits of the Respondent-Corporation in the year 1968 and therefore, if there is some material on record to show that the structures existed in the year 1968, the Respondent-Corporation cannot pass order of demolition. He submitted that as the structures have been in existence for last 30 to 35 years, triable issues are involved in the suit and therefore, the structures need to be protected till final disposal of the suit. He pointed out averments made to the effect that the adjoining structure which was censused in the year 1976 has been tolerated by the Respondent-Corporation and the Respondent-Corporation has permitted construction of a multi-storied building at the instance of a builder in the locality in contravention of Rules of the CRZ and notwithstanding the fact that the area has been declared as no-development zone. The learned Counsel lastly submitted that the Assistant Commissioner of the Respondent-Corporation proceeded on the erroneous assumption that the first date of assessment in respect of the structures was on 1st October 2000 when the assessment bill itself indicated that the first

assessment was of the year 1980. The learned Counsel further submitted that hearing of the suit can be expedited and till that time, the suit structures should be ordered to be protected.

6. Shri Walawalkar, the learned Counsel appearing for the Respondents, submitted that the Appellants have purchased undivided shares in the land with structures with full knowledge that the land is situated in the no-development zone. He pointed out that they have purchased it on "as is where is basis". He submitted that there is no primafacie evidence on record to show that the structures were erected prior to the year 1980. He submitted that the Appellants are not agriculturists and in any event the structures erected by them are not farm buildings within the meaning of section 2(9) of the said Code. He supported the impugned judgment and order.

7. I have considered the rival submissions. As per the order passed by this Court on 17th September 2004, the Collector has submitted report dated 15th December 2004. The Report shows that the city survey enquiry was held in the year 1968 and in the said enquiry the land in question was given City Survey No.1760. The report of the Collector discloses that the existence of structure is not shown in the city survey enquiry conducted in the year 1968. In the City Survey map a copy of which is

annexed to the Report, which was prepared at that time no structures are shown to be in existence on the city survey No.1760. Without recording any specific finding the report further states that local reveals that the structure was in existence for the last 35 years. Even assuming that the structures have been in existence for the last 30 to 35 years, still it is obvious that the same are constructed after the area was included in the limits of the Respondent- Corporation.

8. Perusal of Section 41 of the said Code shows that prior to 1986 prior permission of the Collector was not required for construction of a farm house. It is to be seen here that there is absolutely no material on record, even primafacie, to indicate that the structures were constructed prior to the date on which the land was included in the limits of the Respondent-Corporation. The Respondent-Corporation is the planning authority for the city of Mumbai within the meaning of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the said Act of 1966). Section 41 of the said Code does not dispense with the requirement of obtaining permission of the planning authority under the provisions of the said Act of 1966. In that behalf Shri Walawalkar has rightly relied upon section 156 of the said Act of 1966 which reads as under:

"156. Notwithstanding anything contained in any law for the time being in force-

(b) when permission for such development has not been obtained under this Act, such development shall not be deemed to be lawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under such otehr law for such development has been obtained."

Therefore, if it is assumed that the structures were constructed prior to 1980, the same could not have been constructed without obtaining permission of the planning authority. It is not even the case of the Appellants that a permission of the planning authority was obtained in respect of the said structures.

9. The assessment record shows that the suit structures were assessed to municipal taxes for the first time in the year 1980. It is to be noted that the Assistant Commissioner has made a reference to the first date of assessment of the year 2000 on the basis of the assessment bill which was produced by the Appellants along with the reply to the notice under section 351. Even assuming that the Assistant Commissioner has committed a mistake, when admittedly the structures were not assessed to the municipal tax prior to 1980, the

said mistake is of no relevance at all.

10. It is to be noted here that the reply submitted by the Appellants to the notice under section 351 is very vague. All that is stated is that the structures are old and the Appellants have been paying the municipal taxes from the year 1980. It is not the case made out in the reply that the structures were constructed prior to the year 1968. Both the Appellants have purchased the property in the year 2000. Though notice under section 351 was issued in the year 2001, no attempts have been made by the Appellants even to obtain affidavits of their predecessor in title to show that the structures were constructed prior to 1968. The Appeal has been pending in this Court from August 2004 and the order dated 17th September 2004 passed by this Court specifically sets out the questions which are involved in the Appeals. It is not the case of the Appellants that before entering into the transaction in the year 2000, they made enquiries to ascertain whether the structures were legal. On the contrary both the sale deeds contain a specific recital that the land is in no-development zone and the vendor has transferred his right, title and interest on what is known as "as is where is basis". Therefore, this is not a case where the Appellants have made enquiries regading legality and validity of the structures which any prudent man would make before entering into the transaction in the year

2000. It was their duty to ascertain before entering into transaction that trhe structures were lawfully constructed. The photographs of the structures annexed to the Appeal compilation show that the suit structures are in the nature of regular bungalows.

11. Apart from the above, there is not even a primafacie material to show that the structures were in existence prior to the year 1980. Admittedly no existing policy of the Respondent-Corporatin can protect the unauthorised structures constructed after 1964. In this view of the matter no fault can be found with the order of the trial Court when it was held that the Appellants have failed to prove primafacie case.

12. A grievance is made by the learned Counsel for the Appellants that similar structures in the area are protected by the Respondent-Corporation. The said contention is disputed by the learned Counsel for the Respondents. Even assuming that the Respondent-Corporation has protected some of the illegal structures in the area, that is not a ground to come to the conclusion that the Appellants have established primafacie case.

13. From the addresses of both the Appellants mentioned in the suit and Appeal it is clear that they are not residing in the suit structures. The structures are

obviously unauthorised. Temporary injunction is an equitable and discretionary relief. There is no equity in favour of the appellants. Discretionary relief can never be granted in such cases. Investment made by the Appellants is no consideration. Grant of discretionary and equitable relief in such cases will encourage illegality. The suit structures are not homes of poor or downtrodden. The structures are stated to be farm houses constructed in no-development zone. Therefore, considerations of sympatehy cannot weigh with the Court in case of the Appellants who have taken the property in the year 2000 on "as is where is basis".

14. There is no merit in the Appeals. The Appeals stand dismissed.

15. At this stage Shri Singh, the learned Counsel appearing for the Appellants prays for continuation of order granting ad-interim relief passed by this Court for a period of 12 weeks. The said request is opposed by the learned Counsel for the Respondents. Considering the fact that the ad-interim order was granted by the trial Court and this Court also has granted ad-interim relief, the same deserves to be continued for a reasonable period. Therefore, notwithstanding the dismissal of the Appeals, the parties will maintain statusquo as of today in respect of the suit structures till 31st March 2005. Extension of order of statusquo

will be subject to the condition of the Appellants not creating any third party interest in respect of the suit structures and not parting with possession thereof in favour of any third party. Shri Singh the learned Counsel for the Appellants further submits that it may be clarified that notwithstanding dismissal of the Appeals, it will be open for the Appellants to apply for regularisation. If law permits, the Appellants can apply for regularisation of the structures in question. For that no clarification is required. It is however made clear that the order of statusquo will not be extended on the ground that the Appellants have applied for regularisation of the suit structures and the application is pending.

16. Certified copy expedited.

Judge.